TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
COUNTER-STATEMENT OF THE CASE	3
ARGUMENT IN OPPOSITION:	
POINT I—The decision of the Supreme Court of New Jersey did not constitute a refusal to give the Nevada decree full faith and credit under the Federal Constitution, Article IV, Section 1	7
A. The Nevada judgment and the agreement of the parties embodied therein was subject to modification and therefore was not a final judgment	7
B. The decision of the Supreme Court of New Jersey does not conflict with the doctrine in *Sistare* v. *Sistare* and the cases following that decision	8
POINT II—The State Court judgment is adequately supported on non-federal grounds	11
The Judgment of the State Court is Based on Alternative Grounds	12
A. As to the petitioner's claim for alleged arrearages of alimony	12
B. As to the petitioner's claim for alimony *in futuro*	13

PAGE

POINT III—The raising of the federal question as to the allowance of future alimony, is untimely .. 16

A. The contention that the local policy of the State of New Jersey must yield to the full faith and credit requirement of the Federal Constitution was not raised before the Supreme Court of New Jersey 16

B. The record filed with this Court does not affirmatively show that the specified federal question was presented to the State Court .. 16

POINT IV—The status of the undetermined law of Nevada should be finally decided by the courts of that state 17

CONCLUSION 18

Cases Cited

Aseltine v. Second Judicial District Court, 57 Nev. 269, 62 Pac. (2nd) 701 (Sup. Ct., 1936) 7

Barbour v. Barbour, 323 U. S. 77 (1944) 7

Biel v. Godwin, 245 Pac. 2nd 997 (Sup. Ct., 1952) 10

Blankenship v. Blankenship, 51 Nev. 356; 276 Pac. 9 (Sup. Ct., 1929) 14

Caprio v. Caprio, 8 N. Y. S. 2d 205 (Sup. Ct., 1938) .. 10

Cunningham v. Cunningham, 60 Nev. 191, 105 Pac. (2nd) 398 (Sup. Ct., 1940) 14

Dietrick v. Dietrick, 88 N. J. E. 560 (E. & A., 1918) .. 14

Estin v. Estin, 334 U. S. 541 (1948) 15

Fox Film Corp. v. Muller, 296 U. S. 207 11

PAGE

G. v. G., 67 N. J. E. 30 (Chan., 1904) 14

Gerbig v. Gerbig, 60 Nev. 292, 108 Pac. (2nd) 317 (Sup. Ct., 1940) 14

Halvey v. Halvey, 330 U. S. 610, 615 (1947) 8

Hammerstein v. Superior Court of California, 340 U. S. 622 (1951) 15

Harper v. Carpenter, 24 C. A. 2nd 751, 67 Pac. (2nd) 762 (App. Dep. Sup. Ct., 1937) 14

Helvering v. Fuller, 310 U. S. 69 (1940) 7

Herb v. Pitcairn, 324 U. S. 117 11

Hughes v. Hughes, 125 N. J. E. 47 (E. & A., 1939) .. 10

Isserman v. Isserman, 11 N. J. 106 (Sup. Ct., 1952) .. 14

Koster v. Koster, 137 Conn. 707, 81 Atl. (2nd) 355 (Sup. Ct., 1951) 7

Krieger v. Krieger, 334 U. S. 555 (1948) 15

Lewis v. Lewis, 53 Nev. 398, 2 Pac. (2nd) 131 (Sup. Ct., 1931) 7, 14

Lynch v. New York, 293 U. S. 52 (1934) 17

Lynde v. Lynde, 64 N. J. E. 736 (E. & A., 1902) 14

McGuinness v. McGuinness, 72 N. J. E. 381 (E. & A., 1908) 14

New York ex rel. Cohn v. Gravis, 300 U. S. 308 (1937) 16

Ostrin v. Posner, 215 N. Y. S. 259 (Sup. Ct., 1925) .. 10

Parmley v. Parmley, 125 N. J. E. 545 (E. & A., 1939) 14

PAGE

Radio Station WOW Inc. v. Johnson, 326 U. S. 120, 129 11

Robeson v. Robeson, 9 N. J. 288; 88 Atl. (2nd) 202; certiorari denied 344 U. S. 829 ..... 7, 15

Schneider v. Second Judicial District Court, 64 Nev. 26, 176 Pac. (2nd) 797 (Sup. Ct., 1947) 8

Sistare v. Sistare, 218 U. S. 1 (1910) 7, 8, 9

Spector Motor Co. v. McLaughlin, 323 U. S. 101 (1944) 18

State ex rel. Groves v. First Judicial District Court, 61 Nev. 269, 125 Pac. (2nd) 723 (Sup. Ct., 1942) .. 8

State ex rel. Jones v. Second Judicial District Court, 59 Nev. 460, 96 Pac. 2nd 1096 (Sup. Ct., 1939), 98 Pac. 2nd 342 (Sup. Ct., 1940) 8

Streitwolf v. Streitwolf, 58 N. J. E. 570 (E. & A., 1899) 10

Sutton v. Lieb, 342 U. S. 402 (1952) 7, 9, 18

Van Bushkirk v. Mullock, 18 N. J. L. 184 (Sup. Ct., 1840) 10

Whitehead v. Villapiano, 16 N. J. Super. 415 (App. Div., 1951) 10

White River Lumber Company v. State of Arkansas, ex rel. H. W. Applegate, 279 U. S. 692, 700 (1928) 17

Whitney v. California, 274 U. S. 357, 361 (1927) 17

Williams v. Kaiser, 323 U. S. 471, 477 .....11, 15, 17

Wilson et al. v. Cook, 327 U. S. 474 (1946) 16

Wolfe v. Wolfe, 275 N. Y. S. 821 (Sup. Ct., 1934) 10

U. S. Constitution Cited

PAGE

Article IV, Section 1 ..... 1, 2, 7

Statutes Cited

Compiled Statutes of Nevada, Sections 9463 and 9465 (1929) 8

N.J.S. 2A:34-23 (formerly N.J.S. 2:50-37) 4, 5, 14

28 U. S. C., Secs. 1257(3) and 2101(c) 2

Texts Cited

17 Am. Jur. 478, sec. 615 14

2 Bishop on Divorce (5th Ed.) Section 379 14

27 Corpus Juris Secundum 941, par. 229(b)(2) 14

2 Nelson on Divorce, 20-1, Sec. 14.17 14

2 Schouler on Divorce (6th Ed.) 1973, Section 1805 14

IN THE

Supreme Court of the United States

October Term—1953

No. 185

LORETTA ELIZABETH O'LOUGHLIN,

Petitioner,

vs.

THOMAS A. O'LOUGHLIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of New Jersey is reported officially at 12 N. J. 222 (1953) and appears in the petitioner's record (R. 347).

The opinion of the Superior Court of New Jersey, Chancery Division, Essex County, is not officially reported and appears in the petitioner's record (R. 109).

The opinion of the Supreme Court of New Jersey, upon prior cross-appeals from interlocutory orders made in the cause, is reported officially at 6 N. J. 170 (1951) and appears in the petitioner's record (R. 13).

Jurisdiction

The petitioner contends there is involved in this case a violation of her rights under the Federal Constitution, Article IV, Section 1, in that there was a refusal by the

Supreme Court of New Jersey to enter a judgment for alleged arrearages of alimony and for alimony *in futuro* thereby denying full faith and credit to that part of a Nevada divorce decree which confirmed and adopted a prior property settlement agreement made between the parties (R. 64).

The contention is without merit and the application for a writ of certiorari should be denied.

It is admitted that this Court has jurisdiction under Title 28 United States Codes Sections 1257 (3) and 2101 (c) in a cause which is meritorious.

Questions Presented

Whether the petitioner was denied her Constitutional rights in violation of Article IV, Section 1 of the Federal Constitution by the alleged refusal of the Supreme Court of New Jersey to give full faith and credit to that portion of a Nevada divorce decree in favor of the respondent which confirmed and adopted a prior property settlement agreement, where said agreement was, subsequent to the entry of the decree, modified by the parties, and, as modified, fully performed and accepted for upwards of fourteen years.

Whether the petitioner was denied her Constitutional rights in violation of Article IV, Section 1, of the Federal Constitution where the Supreme Court of New Jersey allegedly refused to give full faith and credit to a Nevada decree of divorce in favor of the respondent by rejecting the petitioner's claim for alimony *in futuro* on the ground that there was no jurisdiction under the New Jersey Statute to make such an award to a former wife who had been adjudged the wrong-doer in the original contested divorce proceedings.

Counter-Statement of the Case

(All italics are ours unless otherwise indicated)

On April 25, 1935, a decree of divorce was entered in the Second Judicial District Court of Nevada, in a suit brought by the respondent (R. 13). The petitioner was adjudged guilty of the marital offense charged after a full adversary proceeding in that court which had acquired jurisdiction of both the persons and subject matter (R. 354).

The Nevada judgment incorporated by reference thereto, the property settlement previously entered into between the parties providing *inter alia* for monthly installment payments of $225.00 (R. 349, 350) and reserved in that court jurisdiction over all questions of alimony and child support and custody which were made subject to modification on application by either party (R. 65).

In October 1935, six months after the decree was entered, the parties entered into an agreement modifying the property settlement agreement whereby custody of the son was taken by the respondent and thereafter he deducted $100.00 a month from the allowance originally provided. For upwards of fourteen years, the respondent paid, and the petitioner accepted without protest, monthly payments of $125.00.

The petitioner, in June 1949, attempted to repudiate the modification agreement of October 1935 by instituting a proceeding in the Nevada court seeking alleged arrearages of $100.00 per month from and after October 1935. *The petitioner's action is still pending in the Nevada Court awaiting an adjudication on the merits* (R. 14, 15, 17).

In December 1949, the petitioner instituted an action in New Jersey seeking substantially the same relief as in the aforesaid undetermined Neveda proceeding. Subse-

quently, the New Jersey suit was amended by the petitioner to include a claim under the New Jersey Statute (N.J.S. 2:50-37; now 2A:34-23) for alimony payable in the future (R. 347-348).

In 1937, petitioner brought an action in the Supreme Court of New York for the recovery of alleged arrearages of alimony due under the Nevada decree. Later in that year, she filed an amended complaint alleging the utter invalidity of the Nevada decree and pleading a cause of action for divorce for adultery based on the respondent's marriage and cohabitation following the Nevada decree. Four years later, in December 1941, her motion in that proceeding for an examination of the respondent before trial was denied for want of good faith. *No further steps were taken until April 1950, when petitioner abandoned the New York action* (R. 18, 283).

The issues tried out in the Superior Court of New Jersey, were (R. 348):

(a) The *quantum* of alimony payable *in futuro*;

(b) The extent of the arrearages, if any, under the Nevada judgment and the agreement of the parties embodied therein;

(c) Whether or not the agreement which was incorporated in the Nevada decree of 1935 had been altered by a subsequent oral agreement between the parties.

The trial Court, on the second and third issues, found:

> "* * * as a matter of law and fact that the agreement had been validly altered and that the appellant (petitioner) by having accepted the benefit of the arrangement between her and the cross-appellant (respondent) over a period of years could not now be heard to complain,"

and dismissed the count for arrearages. On the first issue the trial judge, proceeding on the theory that the Court had jurisdiction to award alimony as such under the New Jersey statute, made an award at the rate of $250.00 per month starting February 4, 1952 (R. 348).

On the appeal of the petitioner, the Supreme Court of New Jersey "as a matter of comity" recognized the (October 1935) agreement to modify as a valid one (R. 352). The State Court rejected the petitioner's contention that the parties were incompetent to enter into a voluntary modification agreement without the sanction of the Nevada Court. In affirming the dismissal of the count as to arrearages, the Supreme Court of New Jersey concluded that *the Nevada judgment,* which had incorporated therein the original property settlement agreement, *was, under the law of Nevada, subject at all times to modification with respect to the custody of the child.* Further, that a study of that agreement indicated the intention of the parties that the amount which the petitioner was to receive (for herself) by way of settlement, was $125.00 per month, and that having accepted that sum over the years, she would not be heard with respect to the modification of the contract to the extent that the respondent would be required to pay her under the Nevada decree $225.00 a month from 1942 (when the child became twenty-one years of age) to 1952 (R. 351).

The respondent's cross-appeal from the allowance of alimony to the petitioner was sustained by the Supreme Court of New Jersey. In his opinion for the Court, Mr. Justice OLIPHANT construed the statute (N.J.S. 2:50-37; now 2A:34-23) thus:

> "Regardless of our public policy however, we are constrained to construe the word 'alimony' as used in Section 2:50-37 in its narrow and technical sig-

> nification as an expression of the continuing duty of the husband to support the wife when he has been guilty of a marital offense. Such has been the construction placed on this word over the years and we cannot construe it differently in the case of a wife who has been adjudged guilty of a marital offense after a full adversary proceeding in a court of competent jurisdiction which had acquired jurisdiction of both the persons and the subject matter, albeit she was awarded by that foreign court installment payments inaccurately labeled 'alimony'. The result would be no different indeed if she had been awarded alimony in the strict sense for such foreign action would have no bearing on New Jersey's public policy as expressed in its statute. Therefore, the Superior Court is without jurisdiction under R.S. 2:50-37 to award alimony as such to the plaintiff in the sum of $250.00 a month starting at the last trial date."

Accordingly, the award of alimony *in futuro* to the petitioner was reversed.

The petitioner did not raise the Federal Constitutional question that "local policy must give way to the 'Full Faith and Credit Clause' of the Federal Constitution" (P. 15) before the Supreme Court of New Jersey.

Petitioner contends that the basic issue is whether New Jersey has given to the Nevada judgment the full faith and credit that is due it under the Federal Constitution.

ARGUMENT IN OPPOSITION

POINT I

The decision of the Supreme Court of New Jersey did not constitute a refusal to give the Nevada decree full faith and credit under the Federal Constitution Article IV, Section 1.

A. The Nevada judgment and the agreement of the parties embodied therein was subject to modification and therefore was not a final judgment.

It has been established beyond question that the decree of a foreign state with respect to alimony is to be accorded full faith and credit under the Federal Constitution only where it has the requisite finality to so entitle it.

Sistare v. *Sistare,* 218 U. S. 1 (1910);
Barbour v. *Barbour,* 323 U. S. 77 (1944);
Sutton v. *Lieb,* 342 U. S. 402 (1952);
Robeson v. *Robeson,* 9 N. J. 288; 88 Atl. (2nd) 202; certiorari denied 344 U. S. 829.

The Nevada judgment under consideration, which adopted and confirmed the prior property settlement agreement between the parties, reserved jurisdiction over all questions of alimony, child support, custody of minor, and right of visitation of minor, all of which were rendered subject to modification by that Court (R. 65). Such a reservation deprived the judgment of the quality of finality.

Helvering v. *Fuller,* 310 U. S. 69 (1940);
Lewis v. *Lewis,* 53 Nev. 398, 2 Pac. (2nd) 131 (Sup. Ct., 1931);
Aseltine v. *Second Judicial District Court,* 57 Nev. 269, 62 Pac. (2nd) 701 (Sup. Ct., 1936);
Koster v. *Koster,* 137 Conn. 707, 81 Atl. (2nd) 355 (Sup. Ct., 1951).

Moreover, under the statutes and adjudicated cases of Nevada, it is clear that the decree could be modified as to the question of custody.

Compiled Statutes of Nevada, Sections 9463 and 9465 (1929);

Schneider v. *Second Judicial District Court,* 64 Nev. 26, 176 Pac. (2nd) 797 (Sup. Ct., 1947);

State ex rel. Jones v. *Second Judicial District Court,* 59 Nev. 460, 96 Pac. 2nd 1096 (Sup. Ct., 1939), 98 Pac. 2nd 342 (Sup. Ct., 1940);

State ex rel. Groves v. *First Judicial District Court,* 61 Nev. 269, 125 Pac. (2nd) 723 (Sup. Ct., 1942).

In these circumstances, "it is clear that the state of the forum had at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered". *Halvey* v. *Halvey,* 330 U. S. 610, 615 (1947).

From the foregoing it is manifest that the Nevada judgment did not possess the requisite finality to entitle it to full faith and credit under the Federal Constitution.

B. The decision of the Supreme Court of New Jersey does not conflict with the doctrine in *Sistare* v. *Sistare* and the cases following that decision.

The petitioner contends generally, without specifying in what respects, that the decision of the Supreme Court of New Jersey is in direct conflict with the decisions of this Court—especially *Sistare* v. *Sistare, supra,* and the cases following and approving it. This contention is without merit.

The Supreme Court of New Jersey, after fully considering the facts and the law, determined (R. 351, 352);

(a) That the Nevada decree into which the original agreement between the parties was incorporated, was, under the law of that state, subject at all times to modification with respect to the custody of the child;

(b) That the change of custody of the child was the valuable consideration supporting the oral agreement of modification entered into between the parties six months after the original decree, and as a matter of comity that modification would be recognized as a valid one;

(c) That a study of the original agreement indicating that it was the intention of the parties that the amount of money the petitioner was to receive monthly by way of settlement was $125.00 per month, and having accepted that sum over the years, she would not be heard to repudiate a valid modification of the contract; and

(d) That "alimony" as such, was not granted the petitioner under the Nevada decree. She was awarded "installment payments inaccurately labelled 'alimony'" (R. 354).

The decision of the State Court as to the validity of the modification should be accepted by this Court. *Sutton* v. *Lieb,* 342 U. S. 402 (1952), wherein it was stated at page 411:

> "The Court of Appeals of the Seventh Circuit has declared on an issue as to whether the petitioner's claim for alimony had been adjusted that there has been in this controversy no compromise of a disputed claim * * *. We accept that ruling."

The rule enunciated in the *Sistare* case (R. 83) has no application here since there was no award to petitioner

of "alimony" as such, and further, that there was a valid modification of the agreement incorporated in the decree, prior to the maturity of installments now claimed as arrearages.

Nor is the petitioner's assertion that the Nevada judgment could only be modified by the judicial action of the courts of that state supported by any citation of authority. Decisions indicating that modifications or compromises of disputed alimony claims are within the competence of the parties to make *inter se*, are numerous.

Whitehead v. *Villapiano*, 16 N. J. Super. 415 (App. Div., 1951);
Hughes v. *Hughes*, 125 N. J. E. 47 (E. & A., 1939);
Streitwolf v. *Streitwolf*, 58 N. J. E. 570 (E. & A., 1899);
Van Bushkirk v. *Mullock*, 18 N. J. L. 184 (Sup. Ct., 1840);
Ostrin v. *Posner*, 215 N. Y. S. 259 (Sup. Ct., 1925);
Caprio v. *Caprio*, 8 N. Y. S. 2d 205 (Sup. Ct., 1938);
Wolfe v. *Wolfe*, 275 N. Y. S. 821 (Sup. Ct., 1934).

See also *Biel* v. *Godwin*, 245 Pac. 2nd 997 (Sup. Ct., 1952), where the Court declined to invoke an estoppel against a divorced wife seeking arrearages because the husband failed in his proof that any understanding had been reached in regard to a reduction of alimony payments under a divorce decree.

This Court should refuse to grant a writ of *certiorari* since there was no refusal by the State Court to give full faith and credit to the Nevada decree.

POINT II

The State Court judgment is adequately supported on non-federal grounds.

This Court has many times adhered to the principle that it will not review a judgment of a State Court which can be based upon a non-federal ground regardless of possible error of the State Court upon a federal question. *Williams* v. *Kaiser*, 323 U. S. 471, 477; *Radio Station WOW Inc.* v. *Johnson*, 326 U. S. 120, 129; *Fox Film Corp.* v. *Muller*, 296 U. S. 207. In *Herb* v. *Pitcairn*, 324 U. S. 117, Mr. Justice JACKSON in his opinion for the Court stated at page 125:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds, *Murdock* v. *Memphis*, 20 Wall. (U. S.) 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164; *Fox Film Corp.* v. *Muller*, 296 U. S. 207 * * *."

And at page 126:

> "But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this court will not review. *Klinger* v. *Missouri*, 13 Wall.

257, 263; *De Saussure* v. *Gaillard,* 127 U. S. 216, 234; *Johnson* v. *Risk,* 137 U. S. 300, 307; *Wood Mowing Machine Co.* v. *Skinner,* 139 U. S. 293; *Adams* v. *Russell,* 229 U. S. 335, 358-61; *Lynch* v. *New York,* 293 U. S. 52."

The Judgment of the State Court is Based on Alternative Grounds

A. As to the petitioner's claim for alleged arrearages of alimony.

The petitioner contended that the Nevada judgment of April 1935 was entitled to full faith and credit in New Jersey, and, irrespective of any modification agreed upon by the parties in October 1935, that a judgment for alleged arrearages of alimony should have been entered. The respondent defended that no arrearages in fact existed, because the parties entered into an agreement some six months after the Nevada decree whereby (1) the custody of the child was assumed by the respondent; (2) petitioner was relieved of all obligations which she had undertaken in the original agreement relating to the maintenance, education and clothing of the child; (3) that from and after October 1935 she was to receive the sum of $125.00 per month; and (4) that the sum of $125.00 per month was paid to and accepted by the petitioner for upwards of fourteen years without protest. The petitioner replied that in fact there had been no such modification and, in any event, it was beyond the competence to enter into such an agreement.

The trial Court, on the issue of the extent of alleged arrearages under the Nevada judgment, if any, declared that it was "essentially a question of fact" (R. 115) and after an extended hearing determined that the original agreement had been validly altered by the parties. The

trial Judge concluded that the petitioner, having accepted the benefit of the arrangement over a period of years, could not now be heard to complain (R. 119).

On appeal, the Supreme Court of New Jersey affirmed that part of the judgment below rejecting the claim for alleged arrearages. On this issue, the Court concluded (R. 352):

> "Therefore, as a matter of comity, the agreement to modify will be recognized as a valid one."

Thus it will be seen that the judgment of the State Court, as to the petitioner's claim for arrearages, rested on adequate state grounds. It should stand regardless of the federal questions raised by the petitioner.

B. As to the petitioner's claim for alimony *in futuro*.

The petitioner now asserts that inasmuch as she was awarded "alimony" under the Nevada decree, that allowance should serve as a basis for an upward modification of alimony in New Jersey. This contention is without merit.

It is conceded that the petitioner was adjudged guilty of a marital offense after a full adversary proceeding in a court of competent jurisdiction which had acquired jurisdiction of both persons and the subject matter (R. 354). The Supreme Court of New Jersey found that the award by the Nevada court was "installment payments inaccurately labelled 'alimony'" (R. 354). Significantly, the petitioner's original complaint (R. 1) described the source of the payments to her as a "property settlement."

The only authority for the award of alimony in New Jersey to a former wife, whether the decree was obtained in that state or elsewhere, is found in the statute N.J.S.

2:50-37; now 2A:34-23. The State Court construed the word "alimony" as used in that statute as an expression of the continuing duty of a husband to support the wife when he is guilty of a marital offense. This construction is in accord with the general rule, that, independent of an express statutory provision, permanent alimony will not be awarded to a wife from whom her husband obtains a divorce for her marital fault or misconduct.

Lynde v. *Lynde*, 64 N. J. E. 736 (E. & A., 1902);
G. v. *G.*, 67 N. J. E. 30 (Chan., 1904);
McGuinness v. *McGuinness*, 72 N. J. E. 381 (E. & A., 1908);
Dietrick v. *Dietrick*, 88 N. J. E. 560 (E. & A., 1918);
Parmley v. *Parmley*, 125 N. J. E. 545 (E. & A., 1939);
Isserman v. *Isserman*, 11 N. J. 106 (Sup. Ct., 1952);
Blankenship v. *Blankenship*, 51 Nev. 356; 276 Pac. 9 (Sup. Ct., 1929);
Cunningham v. *Cunningham*, 60 Nev. 191, 105 Pac. (2nd) 398 (Sup. Ct., 1940);
Lewis v. *Lewis, supra;*
Gerbig v. *Gerbig*, 60 Nev. 292, 108 Pac. (2nd) 317 (Sup. Ct., 1940);
Harper v. *Carpenter*, 24 C. A. 2nd 751, 67 Pac. (2nd) 762 (App. Dep. Sup. Ct., 1937);
17 *Am. Jur.* 478, sec. 615;
2 *Bishop on Divorce* (5th Ed.) Section 379;
2 *Schouler on Divorce* (6th Ed.) 1973, Section 1805;
2 *Nelson on Divorce*, 20-1, Sec. 14.17;
27 *Corpus Juris Secundum* 941, par. 229 (b) (2).

The foregoing construction, "regardless of our public policy," resulted in a determination by the State Court that there was no jurisdiction under the statute to award any alimony to the petitioner (R. 354).

Subsequent to the entry of a foreign divorce decree, the courts of New Jersey had equal jurisdiction with those of the sister state to review any award of alimony as such. This would not constitute an invasion of the territory of the foreign sovereign. *Robeson* v. *Robeson, supra.* See *Estin* v. *Estin,* 334 U. S. 541 (1948) and *Krieger* v. *Krieger,* 334 U. S. 555 (1948) recognizing the divisibility of the decrees of divorce from those for the payment of alimony.

The judgment of the State Court on the second phase of the petitioner's claim, alimony *in futuro,* rested on adequate state grounds and should stand regardless of the federal question belatedly raised by the petitioner.

Where the decision of the State Court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it.

> *William* v. *Kaiser, supra;*
> *Hammerstein* v. *Superior Court of California,* 340 U. S. 622 (1951).

We submit that in view of the adequate non-federal grounds supporting the judgment of the State Court, this Court should refuse to grant a writ of certiorari.

POINT III

The raising of the federal question as to the allowance of future alimony, is untimely.

A. The contention that the local policy of the State of New Jersey must yield to the full faith and credit requirement of the Federal Constitution was not raised before the Supreme Court of New Jersey.

Petitioner has raised for the first time in the petition (P. 15) filed with this Court the contention that "local policy must give way to the 'Full Faith and Credit Clause' of the Federal Constitution." This, in respect to her application to have the Nevada judgment serve as a basis for an award of alimony in New Jersey.

That question was not raised on the appeal to the State Court nor was it directly passed upon.

This Court has time and again held that where the Federal question was not presented to the State Court, a writ of certiorari will not be granted to review the asserted constitutional question. *Wilson, et al.* v. *Cook,* 327 U. S. 474 (1946); *New York ex rel. Cohn* v. *Gravis,* 300 U. S. 308 (1937).

The petition for a writ of certiorari on the ground specified should therefore be denied.

B. The record filed with this Court does not affirmatively show that the specified federal question was presented to the State Court.

The record filed with this Court does not affirmatively show that the Federal question, i.e., that the local policy of the State of New Jersey must yield to the full faith and credit requirement of the Federal Constitution on the question of the allowance to the petitioner of future alimony, was presented to the State Court. This itself, is a

valid reason for a denial of the petition for a writ of certiorari. In *William* v. *Kaiser, supra,* it was stated at page 477:

> "It is a well established principle of this court that before we will review a decision of the State Court, it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."

See also *Lynch* v. *New York,* 293 U. S. 52 (1934); *White River Lumber Company* v. *State of Arkansas, ex rel H. W. Applegate,* 279 U. S. 692, 700 (1928); *Whitney* v. *California,* 274 U. S. 357, 361 (1927).

In view of the fact that the record fails to show that the specified Federal question was presented to the State Court, the petition for writ of certiorari should be denied.

POINT IV

The status of the undetermined law of Nevada should be finally decided by the courts of that state.

Petitioner asserts that there are no decisions in the Nevada jurisdiction as to the effect of a reservation, such as is here found, in a divorce decree of that state. It is also contended, without supporting authority, that the Nevada law as to the right to alimony by a wife adjudged guilty of the marital offense, is contrary to New Jersey's interpretation thereof.

As of January 1950 there were pending in three jurisdictions, proceedings initiated by the petitioner seeking the recovery of alleged arrearages of alimony:

1. An action in the Supreme Court of New York, begun in 1937 and allowed to remain unmoved until it was voluntarily abandoned by the petitioner in April 1950 (R. 18). This, in the face of New York decisions now cited by the petitioner (P. 13) which are alleged to interpret the Nevada law as contended for by the petitioner.

2. A proceeding begun in the Second Judicial District Court of Nevada in June 1949 (R. 14). That suit is still pending and awaiting determination.

3. The action instituted in December 1949 by the petitioner in the Superior Court of New Jersey (R. 1) which has resulted in the judgment here sought to be reviewed.

For reasons obscure, the petitioner elected to go to final hearing on the New Jersey action which necessarily involved the interpretation of the Nevada law. The Supreme Court of New Jersey having done so, and the petitioner being dissatisfied with that interpretation, she now seeks to have this Court determine the local law of the State of Nevada.

In the situation here presented, the only court that should finally determine the law of Nevada on the question raised by the petitioner, is the Supreme Court of Nevada. This Court will not decide questions of constitutionality on the basis of preliminary guesses regarding local law. *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101 (1944). See also concurring opinion of Mr. Justice FRANKFURTER in *Sutton* v. *Lieb, supra.*

CONCLUSION

For the foregoing reasons, we urge that the petition for writ of certiorari, be denied.

Respectfully submitted,

HARRY COHN,
Attorney for Respondent.

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HAROLD B. WILLEY,

Supreme Court of the United States

October Term 1953

No. 185

LORETTA ELIZABETH O'LOUGHLIN, *Petitioner,*

v.

THOMAS A. O'LOUGHLIN, *Respondent.*

REPLY BRIEF

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF

I

The primary issue raised by the Petition for a Writ of Certiorari and the Brief in Opposition thereto is whether this Court's decision in *Sistare* v. *Sistare*, 218 U.S. 1 (1910), as recently reaffirmed in *Barber* v. *Barber*, 323 U.S. 77 (1944), continues to govern State courts in cases involving the application of the full faith and credit clause of the Constitution.

In this case, as in the *Sistare* case, petitioner was awarded alimony payments, upon which respondent fell in arrears. In this case, as in the *Sistare* case, action was brought for recovery of these arrearages in a State other than the one in which the alimony had been originally decreed. Here,

as in *Sistare*, the defense was made that the judgment of the foreign State with respect to alimony was not final and the past due installments, being subject to modification, did not constitute a debt or obligation enforceable in the forum State. And here, as in *Sistare*, this defense was sustained by the highest court of the forum State.

But when the *Sistare* case reached this Court, the judgment of the State court was reversed. The fundamental principle that "alimony decreed to a wife in a divorce . . . is as much a debt of record, until the decree has been recalled, as any other judgment for money is", 218 U.S. at 17, was restated. Moreover, it was emphasized that "every reasonable implication must be resorted to against the existence of" a power to modify or revoke installments of alimony already accrued "in the absence of clear language manifesting an intention to confer it." 218 U.S. at 22. A single exception to the general rule was noted: where, by the law of the State in which the judgment for alimony was rendered, the right to demand the alimony was so discretionary with the court that no absolute or vested right attached to receive the installments as they accrued, the courts of the forum State need not grant judgment for the arrears. After examining the law of the State where the alimony had been decreed, this Court was "unable to assent to the view" of the foreign law taken by the court of the forum State or "to concede the correctness of the effect attributed" by the forum State to that law. It found that law to have established a vested right and held the arrearages recoverable.

In this case, however, the Supreme Court of New Jersey—the court below—made no effort to determine whether under the law of Nevada—where the judgment for alimony was rendered—"an absolute or vested right attaches to receive" the alimony as it accrues or whether the right to demand and receive such alimony was "discretionary with the Court which rendered the decree." It did not resort to "every reasonable implication" against the existence of

a power to modify or revoke installments already accrued. Instead, it equated the modification of *alimony* with a modification of *custody* and found it

> *"unnecessary to examine the intricacies of the law of Nevada relative to the modification of awards of alimony as such."* (R. 352).

Authorizing a modification of alimony, by calling it a modification of custody—without first determining whether this is clearly permissible under the law of Nevada—is not, we submit, a compliance with the requirements of the full faith and credit clause of the Constitution, and directly conflicts with this Court's decision in the *Sistare* case.

The importance of maintaining the vitality of this Court's decisions, particularly in the field of full faith and credit, is too obvious to require argument. Failure by this Court to demand consistent and uniform application from State courts on a question which may "affect large numbers of people and create a social problem of great magnitude" can only "add to the confusion." *Estin* v. *Estin*, 334 U. S. 541, 553 (1948) (Jackson, J. dissenting). The vital interests involved in divorce litigation compel the diligent exercise of this Court's appellate powers "for the elimination of obscurities and ambiguities from the opinions in such cases." See Frankfurter, J. dissenting in *Estin* v. *Estin*, *supra*, at 553.

II

The second question raised in this case relates to the upward modification *prospectively* of the alimony payments based upon various changes in circumstances since 1935 when the original award was decreed. The New Jersey trial court, after hearing, ordered the upward modification. The Supreme Court of New Jersey reversed.

The ground for this reversal is not clear. While two

bases are suggested, neither is stated as decisive. One ground seems to be that the public policy of the State of New Jersey does not permit an alimony award to a wife who has been adjudged guilty of a marital offense; and since Petitioner here was so adjudged, an upward modification of her alimony would "vitiate" the State policy. The other ground seems to be that the courts of New Jersey have no jurisdiction to award alimony to a wife adjudged guilty of a marital offense and therefore they have no jurisdiction in this case to modify the alimony decree made by the court of another State. (R. 354).

It is immaterial upon which of these grounds the reversal rests, for both are actually based on matters of public policy, and, in the light of this Court's decisions, neither is justification for denying Petitioner the upward modification granted by the trial court. Except in the rarest cases, the phantom of local public policy is insufficient to overcome the requirements of full faith and credit. "If in its application local policy must at times give way, such 'is part of the price of our federal system.'" *Sherrer* v. *Sherrer*, 334 U.S. 343, 355 (1947). "The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns." *Estin* v. *Estin, supra*, at 545-546. Thus, so long as the refusal of the court below to permit the upward modification of petitioner's alimony to stand is based on New Jersey's public policy, it is in direct conflict with applicable decisions of this Court.

This conflict is not avoided by placing the decision on so-called jurisdictional grounds. Petitioner's claim for upward modification of the alimony originally decreed falls clearly within the provisions of the New Jersey statute authorizing revisions of alimony payments. That statute, set out in full in Appendix B of the Petition, provides in relevant part:

> " . . . after judgment of divorce, whether obtained in this State *or elsewhere,* the court may make such order touching the alimony of the wife . . . as the circumstances of the parties and the nature of the case shall render fit . . .; orders so made may be revised and altered by the Court from time to time as circumstances may require." (emphasis added).

Clearly, if Petitioner had received a judgment of divorce providing for alimony in a New Jersey court, there would be jurisdiction in a New Jersey court under the above-quoted statute subsequently to alter the alimony payments. Moreover, it is equally clear that if Petitioner had received a divorce and alimony in a proceeding in which she had not been adjudged guilty of a marital offense in a state other than New Jersey, under the statute as construed by the Supreme Court of New Jersey the New Jersey courts would have power to revise the alimony. In actual effect, therefore, the court below is determining the question of jurisdiction by looking behind the Nevada judgment of alimony and saying that Petitioner cannot receive from a New Jersey Court a modification of her alimony award made by a sister state because she could not have received such a judgment in New Jersey in the first place. This, we submit, is irrelevant, and irreconcilably conflicts with the decisions of this court.

The Nevada judgment of divorce and alimony was rendered with both parties before it, and both parties have been before the courts of New Jersey. Accordingly, there is no question here of the absence of procedural due process. Cf. *Estin* v. *Estin,* supra; *Kreiger* v. *Kreiger,* 334 U.S. 555 (1948). Nor has there been any question raised as to the Nevada court's *power* to award alimony to Petitioner. Thus the Nevada decree was a valid "judgment of divorce . . . obtained . . . elsewhere" within the meaning of the New Jersey statute. The circumstances necessary to justify an upward revision of the 1935 alimony award were established to the satisfaction of the trial court below which granted the upward modification. Accordingly, the only

basis on which the Supreme Court of New Jersey denied petitioner that modification, was by treating her alimony decree differently from alimony decrees which meet the test of New Jersey's public policy, i.e., that there may be no alimony to a wife adjudged guilty of a marital offense. In effect, the court below has rewritten the statute to provide that "after judgment of divorce, whether obtained in this State or elsewhere, the court may make orders touching the alimony of the wife *except in cases where the alimony so awarded is against the public policy of this State.*"

This, we contend, is not the rendering of full faith and credit to a valid judgment of a sister state; but constitutes a denial of the respect which that constitutional admonition commands. The exacting demands of full faith and credit can no more be avoided by resort to rules of "jurisdiction" based upon public policy, than by resort to the public policy itself. Cf. *Sistare* v. *Sistare,* supra, at 26; *Lynde* v. *Lynde,* 181 U.S. 183.

III

A. Respondent's Brief in Opposition (p. 16) suggests that Petitioner had failed to raise in the court below the question that New Jersey's public policy prohibiting the additional allowance for future alimony must yield to the requirements of the full faith and credit clause.

Respondent is in error. The question was briefed in detail in Petitioner's reply brief in the Supreme Court of New Jersey (R. 132-134) and, of course, that court passed upon it (R. 353-354).

B. Respondent also suggests that the decision below is adequately supported on non-federal grounds (pp. 12-15).

As to the arrearages, Respondent contends that the trial court "determined that the original agreement had been validly altered by the parties" and the Supreme Court affirmed on the same theory. But as we have shown on pp. 2-3, supra, this determination was made without even examining the law of Nevada relating to alimony to deter-

mine whether *under Nevada law* such a modification would be valid.

As to the future payments, Respondent urges the "jurisdictional" argument as being a state ground. As we have noted, however, this jurisdictional argument is really based upon the New Jersey public policy and is therefore not a jurisdictional argument at all.

C. Finally, Respondent argues that the "undetermined" law of Nevada should be left to the Nevada courts to decide.

As we have indicated, the fact of the matter is that the court below did not even look to the law of Nevada relating to modifications of alimony, but expressly indicated that it was "unnecessary" to examine that law. To suggest that the Nevada law on that subject is "undetermined" would appear premature.

But in any event, if there are questions of Nevada law to be determined, it is appropriate to repeat this Court's observation in *Barber* v. *Barber*, supra, that this "is not a case where a question of local law is peculiarly within the cognizance of the local courts in which the case arose." The determination of Nevada law can be made by this Court as readily as by the New Jersey courts, "and since a federal right is asserted, it is the *duty* of this Court, upon an independent investigation, to determine for itself" the law of Nevada. 323 U.S. at 81; see also *Adam* v. *Saenger*, 303 U.S. 59.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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